HIGH COURT OF UTTARAKHAND AT NAINITAL

(Court's order whether the case is or not approved for reporting).

(Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 203 (M/S) of 2002
Basant Lal Sah S/o Late R. L. Sah
And another.
Vs.

Addl. District Magistrate Nainital
And others.

Approved for reporting.

_____

Not approved for reporting

Date of decision 07.02.2006.

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

WRIT PETITION NO. 203(MS) OF 2002

1. Shri Basant Lal Sah, S/o late R.L. Sah, R/o Ajanta Hotel, Mallital, Nainital.
2. Sri Digmbar Singh Bhakuni, S/o late Mohan Singh Bhakuni, Stenographer District Consumer Forum, Nainital, R/o Richmond House No. 40/4 Cantonment, Tallital, Nainital. .....Petitioners.

Versus

1. Addl. District Magistrate (Acting as District Magistrate under U.P. Act No. 13/72), Nainital.
2. District Judge, Nainital.
3. Divisional Engineer (Phones), Bharat Sanchar Nigam, Nainital. .....Respondents.

Dated: 07.02.2006

Hon'ble Rajesh Tandon, J.

Head Sri Gurdayal Singh and Siddhartha Sah, learned counsel for the petitioners and Standing Counsel for the respondents no. 1 and 2 and Smt. Anjali Bhargawa for the respondent no. 3.

By the present writ petition, the petitioners have prayed for a writ of certiorari quashing the orders dated 12.04.2002/15.04.2002 and 29.04.2002 passed by the respondents nos. 1 and 2 respectively.

Brief facts giving rise to the present writ petition are that house no. 40/02 (called Richmond House) situated at Cantonment Nainital is the property involved in its release/allotment under the provisions of Section 16 of U.P. Act Urban Bildings (Regulation of Letting Rent & Eviction) Act, 1972 is applicable in the cantonment area vide Appendix II of the Act. The petitioner no. 1 is the landlord and the petitioner no. 2 is in

occupation of the premises being the nominee of the landlord and has applied for allotment of the same in his favour. The first petitioner has filed the release application under Section 16 of U.P. Act No. 13 of 1972 on the ground that the premises was declared vacant on 19th January, 2001 and the application was filed on the ground that the premises is required for his use and occupation. The respondent no. 3 has also applied for allotment of the said premises. On the filing of the aforesaid applications for release/allotment, a report was submitted on 29.12.2000 by the Rent Control Inspector and on 4th January, 2001 in pursuance of the report of the inspector vacancy in respect of the premises was declared.

After the declaration of the vacancy, the proceedings for release/allotment were started and approximately 13 applications were received for allotment. The application for allotment filed by the petitioner no. 2 was for residential requirement. The respondent no. 3 required the premises for opening the office of *Amar Ujala*. However, the Rent Control and Eviction Officer on 12.04.2002 allotted the premises to the respondent no.3. The Rent Control and Eviction Officer has observed that the requirement of Regional Engineer, Phones, Nainital under Section 16 of U.P. Act No. 13 of 1972 read with Rule 11 of the Rules framed under U.P. Act No. 13 of 1972 is bonafide. As will appear from the record, the petitioner no. 1 has nominated the petitioner no. 2 for allotment of the premises in January, 2001.

The petitioner has preferred a revision before the District Judge. The District Judge has confirmed the order passed by the Rent Control and Eviction Officer allotting the premises to the respondent no. 3.

Feeling aggrieved by the said order, the petitioners have come up in the present writ petition.

From the pleadings of both the parties following points require consideration in the present writ petition:-

I) Whether the need of the landlord/petitioner no. 1 is bonafide and genuing ?

II) Whether the premises being residential and therefore, the allotment in favour of the respondent no. 3 being for non-residential purpose can be maintained ?

III) Whether the nomination made by the landlord under Section 17(1) of he Act being mandatory and the findings of the two courts below by ignoring the sameare liable to be vitiated by an error of law ?

IV) Whether, there has been a manifest error of law in order to invoke the provisions of Article 226/227 of the Constitution of India ?

Point No. 1 with regard to Bonafied Need of the Landlord

So far as the findings on the bonafide need of the petitioner no. 1 is concerned, the premises is in occupation of the petitioner no.2 and therefore, there is no occasion to treat the requirement of the petitioner no.1 as bonafide. The respondent no. 3 has also admitted this fact as will appear from paragraph 30 of the counter affidavit filed by the respondent no.3 that the petitioner no. 2 is in occupation of the premises in dispute being the nominee for allotment of the premises in dispute. So far as bonafide need of the landlord/petitioner no.1 is concerned, two courts below have recorded a finding against the petitioner no. 1 by holding that the need of the petitioner no. 1 is not bonafide, I find no error of law in recording the said finding and the same is a finding of fact. Therefore, I find that there is no occasion to interfere with the findings of fact recorded by the two courts below under Article 226/227 of the

Constitution of India so far as need of the petitioner no. 1 is concerned.

Point No.2

So far as the second point regarding the allotment in favour of the respondent no. 3 is concerned, the premises being owned by the petitioner no. 1, nomination having been made in favour of the petitioner no. 2 under Section 17(1) of the U.P. Act No. 13 of 1972, there is no occasion to deviate from the nomination of the landlord. Counsel for the petitioners has pointed out that the premises is a residential one and as such the allotment in favour of the respondent no. 3 for non-residential purposes is vitiated by an error of law.

A perusal of the counter affidavit shows that the portion sought to be allotted, is residential one and has been in the use of the judicial officers. From paragraph 5 of the counter affidavit filed by the respondent no. 3, it is evident that the building in dispute i.e. half western portion of the building Richmond House, situated at Cantonment, Tallital, Nainital) was being used for residential purpose by the Judicial Officers of Nainital from last several years and the same was declared vacant after having been vacated by Sri U.S. Pangtey and thereafter, the same was allotted to one Sri Manvendra Singh, the tem Addl. Civil Judge (S.D.), Nainital but on 27th April, 2000, he having informed the respondent no. 1 that the house is in dilapidated condition and requires at least Rs. Twenty Thousand to Twenty Five Thosand for repair. Sri Manvendra Singh having informed that the key has been given to the Central Nazir, District Judge, Nainital.

So far as the applicability of Rule 11 is concerned, the order of priorities has been provided in the allotment of the residential building. Rule 11 reads as under:-

"11. ***Order of priorities in allotment of residential buildings [Section 16 and 34(8)].*** - *(1) In making allotment of residential building, the following order or priorities shall be observed:*

firstly, for public purposes :

secondly, for accommodating a person against whom an order has been passed for eviction under Section 21, not being a tenant referred to in Explanation (1) to Section 21(1), or a decree has been passed in a suit filed with the permission of the District Magistrate under Section 3 of the old Act (or such suit or application is pending) and who or members of whose family do not own or hold as tenants any other residential building in the same city municipality, town area or notified area;

thirdly, for accommodating others ;

and in each of the above categories subject to the provisions of sub-rule (2), the principle "first come, first served" shall be followed.

(2) Amongst the priority categories mentioned above, the following principles shall ordinarily be followed, subject to the provisions of sub-rule (3):

(a) A building vacated by a Government servant shall, as far as possible, be given to his successor-in-office, if any, or to any other government servants belonging to the same department :

(b) Subject to clause (a) and sub-rule (3), among Government servants, the relative length of stay in station, without suitable accommodation, shall be taken into consideration.

(c) In the case of requirement of accommodation for State Government officers belonging to the same department, the priority shall be determined by the head

of that department of the principal head of that office, as the case may be.

[(4) Notwithstanding anything in sub-rules (1), (2) and (3) the District Magistrate may, for adequate and exceptional reasons to be recorded in writing, depart from principle "first come, first served", and make allotment of any building out of turn to any person.]

(5) Subject to the foregoing sub-rule, it should be ensured that no person shall be allotted a building which carries so little rent that he is able to get a residence on payment of rent which is less than 10 percent of his salary or other income, after taking into consideration, the house rent allowance allowed by his employer. At the same time where more than one building is available for allotment among two persons belonging to the same priority category the building carrying higher rent should be allotted to the person getting higher salary or other income and the building carrying less rent should be allotted to the person getting less salary or other income."

As will appear from Rule 11 that in making the allotment of a residential building the priorities have to be followed only in case of residential building.

In ***D.F. Gandhi and another Vs. Rent Control and Eviction officer, Ist, District Allahabad and others ARC 1997 (2) 501,*** it has been held as under:-

"Sub Section (1) of Section 17 applies both where a tenant has ceased to occupy or expected to vacate. A perusal of Rule 9 would also lead to same conclusion inasmuch as sub-clause (f) of sub-rule (1) requires mentioning of the actual or expected date of vacancy. If Section 15(1) was not applicable in cases of expected vacancy, clause (f) of Rule 9 would not contain the

words "expected date of vacancy". Therefore, there can be no doubt that Section 15 (1) is applicable not only to the actual vacancy but also to cases where the building is likely to fall vacant on account of cessation of occupation by the sitting tenancy."

Rule 11 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 has also been dealt with in ***Dinesh Kumar v. Second Addl. District Judge, Aligarh [1998 (U.P.) RCC 103].*** Relevant paragraph 8 of the said judgment is quoted below:-

> *"8. A bare look of the above provisions would show that priorities enumerated in Rule 11 are to be applied to only when the question of allotment of a residential building is to be considered and no priority is laid down for the purposes of making order of allotment for non-residential buildings. The revisional court thus committed a manifest error of law in upholding the order of allotment by applying Rule 11 of the Act."*

Therefore, point no. 2 is decided in favour of the petitioners. The premises in dispute was available only for residential purposes and not for non-residential purposes and as such the allotment in favour of the respondent no. 3 cannot be allowed to stand. The orders passed by the courts below are therefore set-aside to that extent.

Point No. 3

A perusal of the record shows that on 25th July, 2000, the vacancy was intimated by sending a letter by Sri Manvendra Singh. On his application, the report was submitted by the Rent Control and Eviction Officer on 29th December, 2000. After considering the report, the vacancy was notified on 4th January, 2001 under Section 12 of the U.P. Act No. 13 of 1972.

On 23rd January, 2001, the application for release was moved by the petitioner no. 1. Rule 10 is a procedure for allotment under Section 16(1)(a) of the U.P. Act NO. 13 of 1972.

Rule 10 of the U.P. Act No. 13 of 1972 relates to the allotment procedure and Rule 11 of the U.P. Act No. 13 of 1972 deals with the question of merit amongst allotment. Rules 10 and 11 are quoted below:-

> ***"10. Allotment procedure [Sections 16(1)(a) and 34(8)].***-*(1) (a) An application for allotment of a building shall be made in Form A.*
>
> *(b) The District Magistrate shall maintain a register of application for allotment of buildings.*
>
> *(c) The applications shall be classified according to the priority categories specified in Rule 11 and shall be registered in order of receipt of applications.*
>
> *(d) For each priority category, there shall be a separate register and the applicant shall be given a serial number showing the number and date of his registration and the priority category in which he has been registered.*
>
> *(e) Each such register shall be open to inspection by any member of the public on application being made in that behalf.*
>
> *(2) In the case of requirements for Government office and accommodation for Government servant while posted in that local area, a request by the Head of Department or Principal Head of Office shall be sufficient and his letter shall be treated as a substitute for the application and shall be entered as such.*

(3) A tenant against whom a suit for eviction filed with the permission of the District Magistrate under Section 3 of the old Act or an application under Section 21 is pending may immediately apply for allotment of alternative accommodation and need not wait till the decision of that suit or application. Such application shall be without prejudice to the result of the said proceedings.

(4) The register shall be prepared afresh for every calendar year and applicants who are unable to secure allotment by the end of a year and whose applications were not rejected as not maintainable may apply by the 15th January of the succeeded year for renewal of registration of their applications and shall thereupon retain their original relative priority in comparison to other applicants and the names of persons whose applications are so renewed shall stand above the names of new applicants in that year.

[(5) A building shall not ordinarily be allotted to the following persons or for the following purposes-

(a) A tenant against whom a decree or order has been passed for ejectment on any ground mentioned in clauses (a) to (f) of sub-section (I) of Section 3 or under Section 7-B of the old Act or on any ground mentioned in clauses (a) to (f) of sub-section (2) of Section 20 during a period of two years from the date of such decree or order or any ember of his family or any person of whose family he is a member;

(b) For residential accommodation of employees of business concerns who are allowed by their employers full re-imbursement of house rent paid by them;

(C) For residential accommodation of a person already occupying a building governed by the Act or any public premises other than any premises granted to him free of rent in connection with the discharge of any duties of public nature and situated anywhere in the State or any member of the family of such person or any person of whose family he is a member, except where such person will vacate the other building or public premises at the time of allotment;

(d) For accommodating a person who has entered into unauthorized occup0ation of the building or any part thereof without the written consent to the landlord.]

(6) A person who is deemed to have ceased to occupy a building within the meaning of Section 12(1)(b), or who is evicted under Section 21 by virtue of being a tenant referred to in Explanation (1) of Section 21(1) shall not be allotted that or any other residential building and a person who is deemed to have ceased to occupy a building within the meaning of Section 12(2), shall not be allotted that or any other non-residential building for a period of two years from the date of such eviction or deemed cessation, as the case may be:

Provided that-

(a) if the District Magistrate is satisfied in a case referred to in Section 12 (2) that the admission of partner or new partner is bona fide transaction and not a mere cover for sub-letting, he shall, if any application had been made in that behalf before the admission of such partner or new partner, allot the non-residential building in

question afresh to the newly constituted or re-constituted firm;

(b) *in the case of a residential building under the tenancy of a person who shall be deemed by virtue of Section 12(3) to have ceased to occupy it by reason of his or any member of his family building or otherwise acquiring in a vacant state or getting vacated another residential building in the same local area, whether that other building is built or acquired or got vacated before or after the date of commencement of the Act, if the District Magistrate is satisfied that the two buildings are occupied by the tenant and a member of his family separately, and that they are separate in messing, the District Magistrate may reallot the residential building deemed to be vacant under Section 12(4) to the said tenant or to the said member of his family, as the case may be;*

(c) *in the case of a residential building under the tenancy of a person who shall be deemed by virtue of the proviso to section 12(3) to have ceased to occupy it upon the expiration of a period of one year from the date of commencement o;f; the Act by reason of his or any member of his family having built another residential building in the same local area, where that other building was let out at the commencement of the Act and the tenant or the member of his family, as the case may be, has been unsuccessful in spite of his best efforts in securing vacant possession thereof the District Magistrate may postpone the making of allotment*

order in respect of the building deemed to be vacant under Section 12(4).

(7) The power of the District Magistrate under Section 17(1) to disregard the nomination by the landlord in the event of the District Magistrates' failure to make the allotment order within twenty-one days from the date of receipt of intimation of vacancy or expected vacancy of a building shall be exercised very sparingly and only when for a public purpose of an urgent nature, the District Magistrate considers it necessary so to do.

Section 17 provides the requirement of nomination by the landlord. Section 17(1) reads as under:-

"17. Conditions of making allotment order. –(1) Where the District Magistrate receives an intimation, under sub-section (1) of Section 15, of the vacancy or expected vacancy of building any allotment order in respect of that building shall be made and communicated to the landlord within twenty-one days from the date of receipt of such intimation, and where no such order is so made or communicated within the said period, the landlord may intimate to the District Magistrate the name of a person of his choice, and thereupon the District Magistrate shall allot the building in favour of the person so nominated unless for special and adequate reason to be recorded he allots it to any other person within ten days from the receipt of intimation of such nomination :

provided that where the landlord has made an application under clause (b) of sub-section (1) of Section 16, for the release of the whole or any part of the building or land appurtenant thereto in his favour, the said period of twenty-one days shall be computed from the date of decision on that application or where an application for review or an appeal is

filed against such decision, from the date of decision on such application or appeal."

Section 17 provides that where the District Magistrate receives an intimation under Sub-section (1) of Section 15 of the vacancy or expected vacancy of the building, the allotment order in respect of that building shall be made and communicated to the landlord within 21 days from the date of such intimation and where no such order is made or communicated, the landlord may intimate to the District Magistrate the name of person of his choice and the District Magistrate shall allot the building in favour of the persons so nominated. Sub Clause (7) of Rule 10 also contains the similar provision and the District Magistrate can not go beyond the nomination if the allotment order is not made within 21 days from the date of receipt of intimation of vacancy or expected vacancy of the building. A perusal of the order shows that it has been issued on 15th April, 2002 when in point of fact the nomination was made on 23rd January, 2001 and the intimation of vacancy has been made on 25th July, 2000. The nomination having been made after 21 days as contained under Section 17(1) of the Act read with Sub Clause (7) of Rule 10 of the Rules framed under the Act, the District Magistrate is left with no option except to allot the premises to the nominee of the landlord. More so when the premises was not available for non-residential purposes, there was no option for the District Magistrate except to allot the premises in favour of the petitioner no. 2, who is the nominee of the landlord.

In ***Mandir Ram Janki, Gulraghat Jaunpur v. Narendra Kumar another 1985 (1) ARC 241,*** it has been held as under:-

"4. Section 17 of the Act provides that where the District Magistrate receives an intimation under Sub-

section (1) of Section 15 of the vacancy or expected vacancy of a building and allotment order in respect of that building shall be made and communicated to the landlord within twenty-one days fro the date of receipt of such intimation, and where no such order is so made or communicated within the said period, the landlord may intimate to the District Magistrate the name of a person of his choice and there upon the District Magistrate shall allot the building in favour of the person so nominated unless for special and adequate reasons to be recorded he allots it to any other person within ten days from the receipt of intimation of such nomination. A bare reading of this provision indicates that the terms of the provision tha the order of allotment shall be passed by the authority concerned within 21 days are mandatory. No exception has been provided by the legislature. This is evident from the fact that immediately after the expiry of 21 days a right accrues in favour of the landlord to nominate his tenant and the legislative scheme appears to be that in the normal course the nominee of the landlord should be allotted the accommodation. At his stage, the contents of Rule 10(7) of the Rules may be considered. This rule provides that the discretion of the District Magistrate under Section 17(1) to disregard the nominee of the landlord, in the event of District Magistrate's failure in making an allotment order within 21 days from the date of the receipt of the communication of the vacancy or expected vacancy of the accommodation, shall be exercised very sparingly and only for a public purpose.

5. Let us now advert to the order of allotment passed in this case. No reason whatsoever has been assigned in

the order of allotment. In it, there is a recital that the landlord refused to accept the notice. This notice was sent to him by registered post. This order says that the need of Sri Narendra Kumar is considered to be genuine and, therefore, the accommodation in question is being allotted to him. It will be seen that in the order there is not even a whisper for attracting the provisions of rule 10(7). No attempt has been made to explain as to why the landlord is being denied an opportunity of nominating his tenant. The order of allotment is, therefore, ex facie bad, without jurisdiction and it is liable to be set aside."

Relying upon the judgment of ***Mandir Ram Janki, Gulraghat Jaunpur v. Narendra Kumar another 1985 (1) ARC 241*** in ***Fateh Bahadur Srivastava Vs. IInd Addl. District Judge, Saharanpur, ARC 1987 (1) 426,*** it has been held that the nomination can be ignored only in exceptional circumstances. Relevant observations are quoted below:-

"8. Construing Section 17(1) of the Act and its true import it was observed by a learned Single Judge of this Court in the case of Mandir Ram Janki Gulraghat Jaunpur v. Narendra Kumar antohers, reported in 1985 (1) ARC p.241 at p. 242 summed up law thus :

"Section 17 of the Act provides that where the District Magistrate receives an intimation under sub-section (1) of Section 15 of the vacancy or expected vacancy of a building an allotment order in respect of that building shall be made and communicated to the landlord within twenty-one days form the date of receipt of such intimation, and where no such order is so made or communicated within the said period, the landlord

may intimate to the District Magistrate the name of a person of his choice and thereupon the District Magistrate shall allot the Building in favour of the person so nominated unless for special and adequate reasons to be recorded he allots it to any other person within ten days from the receipt of intimation of such nomination. A bare reading of this provision indicates that the terms of the provision that the order of allotment shall be passed by the authority concerned within 21 days are mandatory. No execution has been provided by the legislature. This is evident from the fact that immediately after the expiry of 21 days a legislative vice scheme appears to be that in the normal course the nominee of the landlord should be allotted the accommodation. At his stage, the contents of Rue 10 (7) of the Rules may be considered. This rule provides that the discretion of the District Magistrate under Section 17(1) to disregard the nominee of the landlord, in the event of District Magistrate failure in making an allotment order within 21 days from the date of the receipt of the communication of the vacancy or expected vacancy of the accommodation, shall be exercised very sparingly and only for a public purpose.

10. With respect I entirely agree with this interpretation. The language of Section 17(1) is peremptory and unambiguous. So also of Rule 10(7). Rule 10)7) leaves no manner of doubt that the nomination made by the landlady under Section 17(1) can be ignored only in exceptional circumstances and

only for a public purposes of an urgent need. The nomination made under Section 17(1) cannot in my view, be ignored by comparing the competing claims of different applicants for allotment. Section 17(1) does not contemplate that the nomination can be negatives out the ground that an applicant for allotment has a better claim than that set up by the nominee."

In **Vinod Kumar Darbari Vs. D.J., Allahabad and others, 1980 ARC 442** after relying upon the decision of Queens Bench Decision as well as on the maxim of *Expressio uniusesi exclusio alterius,* it has been held that if intimation was required and the same having been done, the courts may endeavor to ascertain the legislative intent. Relevant observations are quoted below:-

:In Colquohoun v. Brooks (1888) 21 QBD 82, it was observed by Wills,J. at page 62 : "that the aforesaid maxim is often a valuable servant, but a dangerous master." In Assistant Collector, General Exercise v. N.T. Company of India Ltd A.I.R. 1972 S.C. 2563, it was held that the rule of construction that, where a mode of performing a duty is the maxim. "Expressio uniusesi exclusio alterius" is subservient to the basic principle that Courts must endeavour to ascertain the legislative intent and then adopt a rule of construction which effectuates rather than one that may defeat these. To me it appear that the purpose of Rule 9 of the rules was to given the information contemplated therein so that the Rent control and Eviction Officer may have no difficulty in a ascertaining the necessary details in respect of the accommodation which has fallen vacant or is likely to fall vacant and is passing an order of allotment expeditiously in respect of the accommodation.

9……..I am of opinion that in view of what has been pointed out above the Rent Control Eviction Officer on the facts of the instant case ignored the nomination made by he landlord on just lame excuses. I accordingly am of the opinion that there is no substances in the submission made by counsel for respondent no.3.

11. Before parting with the case I may point out to another submission connected with the second submission referred to above made by counsel for respondent no. 3. It was that even if a right accrued in favour of the landlord to make a nomination under section 17(1) of the Act he could exercise the said right of nomination only one.

12. In the result I am of the opinion that the impugned order of allotment which had been passed after about nine months of the date of intimation of vacancy and after about four months of the date of nomination made but the landlord in favour of the petitioner cannot be sustained and deserves to be quashed. The order of the District Judge also deserves to be quashed in consequence.

13. In view of the foregoing discussion the writ petition succeeds and is allowed and the impugned order of allotment dated 3rd May, 1979 passed by the Rent Control and Eviction Officer and the order dated 10th May, 1979, passed by the District Judge dismissing the revision filed by the petitioner are quashed. In the circumstances of the case, the parties shall bear their own costs."

It is settled that if statue requires that a particular act should be done in a particular manner, it has to be done in that manner as held in ***I.T.C. Bhadrachalam Paperboards v.***

Mandal Revenue Officer (1996) 6 SCC 634. The relevant observations are quoted below:-

"If the statute requires that a particular act should be done in a particular manner and if it is found, as we have found hereinbefore, that the act done by the Government is invalid and ineffective for non-compliance with the mandatory requirements of law, it would be rather curious if it is held that notwithstanding such non-compliance, it yet constitutes a 'promise' or a 'representation' for the purpose of invoking the rule of promissory/equitable estoppel. ...Such a course would render the mandatory provisions of the enactment meaningless and superfluous."

In view of the above, I find substance that provision with regard to nomination as contained under Section 17(1) of the Act is mandatory and binds the authority in case of failure of the allotment as required under the Act.

Point No. 4.

It has come in the evidence that the landlord having nominated the petitioner no. 2 on 23rd January, 2001 and the intimation of vacancy having been made on 25th July, 2000. The District Magistrate/ Rent Control and Eviction Officer has no option except to allot the premises in accordance with the nomination made by landlord as admittedly no allotment was made within 21 days of the intimation of vacancy. Further even assuming that it was open for the District Magistrate/Rent Control and Eviction Officer to ignore the nomination, the same could not have been done as the premises being residential and therefore, Rule 11 has no application as it applies to residential alone. The record shows that the premises has always been used for residential purposes.

In view of the aforesaid facts and circumstances, the law applicable in the case of ***Surya Dev Rani Vs. Ram Chander***

Rani (2003) 6 SCC 675 is fully applicable as the Apex Court has held that where there is manifest unjust and grave error of law Article 226/227 of the Constitution of India can be invoked. Relevant observations of the apex Court are quoted below:-

> *"(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross error of jurisdiction i.e. when a subordinate court is fond to have acted ..or (iii) acting in flagrant disregard of law or the rule of procedure of acting in violation of principles of natural justice."*

The petitioner no. 2 is already in possession of the premises in pursuance of the nomination made by the petitioner no. 1, he shall continue to be in possession and the deeming clause shall be fully applicable in the present case in accordance with Section 17(1) of the Act read with Clause (7) of Rule 10 of rules framed under the Act.

Section 17 is a sort of deeming clause which provides that the allotment has to be made in favour of the nominee of the landlord, if it has not been done within a particular period of time. Thus by fiction of law, the allotment order goes in favour of the nominee of the landlord. The word "fiction" has been defined by the Apex Court in ***Harish Tandon Vs. Addl. District Magistrate, Allahabad U.P. 1995(1) ARC 220.*** The same is quoted below:-

> *"It should be read as 'deemed until the contrary is proved. Reference was made to the cases Gray v. Kerslake, (1957) Vol. II DLR (2nd Series) 225 (at p. 239) ; Rober Batcheller and Sons Limited v. Batcheller, (1945) I CD 169, and Spencer v. Kennedy, (1926) 1 CD 125, where it was observed that if the word 'deemed' is held to be conclusive, then it shall amount to imputing to the Legislature the intention of requiring the Court to hold as a fact something directly contrary to the true fact. It was also said that such deemed*

clauses should be read to mean as required by the statute, until the contrary is proved.

13. The role of a provision in a statute creating legal fiction is by now well-settled. When a Statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the Court has to examine and ascertain as to for what purpose and between what persons such a statutory fiction is to be resorted to. There after, full effect has to be given to such statutory fiction and it has to be Dwelling Co. Ltd. v. Finsbury Borough Council, (1952) AC 109 (B), Lord Asquith while dealing with the provisions of the Town and Country Planning Act, 1947, observed :

"If you are bidden to treat an imaginary State of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative, State of affairs had in fact existed, must inevitably have flowed from or accompanied it.……The statute says that you must imagine a certain State of affairs ; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that State of affairs."

That statement of law in respect of a statutory fiction is being consistently followed by this Court. Reference in this connection may be made to the case of state of Bombay v. Pandurang Vinayak and others, AIR 1953 SC 244 : 1953 SCR 773. From the facts of that case it shall appear that Bombay Building (Control on Erection) Ordinance, 1948 which was applicable to certain areas mentioned in the scheduled to it, was extended by a notification to all the areas in the province in respect of buildings intended to be used for the purposes of cinemas. The Ordinance was repealed and replaced by an Act

which again extended to areas mentioned in the schedule with power under sub-section (3) of Section 1 to extend its operation to other areas. This Court held that the deemed clause in Section 15 of the Act read with Section 25 of the Bombay General Clauses Act has to be given full effect and the expression 'enactment' in the act will cover the word "Ordinance' occurring in the notification which had been issued. In that connection it was said :

"The corollary, thus, of declaring the provisions of Sec. 25, Bombay General Clauses Act, applicable to the repeal of the ordinance and of deeming that ordinance an enactment is that, whatever, the word "ordinance" occurs in the notification, that word has to be read as an enactment."

14. In the case of Chief Inspector of Mines and another etc. v. Karam Chand Thapaer etc., AIR 1961 SC 838 : 1962 (1) SC R 9, it was said :

"Were these regulations in force on the alleged date of contravention ? Certainly, they were, in consequence of the provisions of Section 24 of the General Clauses Act. The fact that these regulations were deemed to be regulations made under the 1952 Act does not in any way affect the position that they were laws in force on the alleged date of contravention. The argument that as they were "regulations" under the 1952 Act in consequence of a deeming provision, they were not laws in force on the alleged date of contravention is entirely misconceived."

15. In the case of M/s J.K. Cotton Spinning and Weaving Mills Ltd. and another v. Union of India and others, AIR 1988 SC 191 : 1988 (1) SCR 700, it was said:

"It is well-settled that a deeming provision is an admission of the non-existence of the fact deemed. Therefore, in view of the deemng prvisions under Explanation to Rr. 9

and 49j, although the goods which are produced or manufactured at an intermediate stage and, thereafter, consumed or utilized in the integrated process for the manufacture of another commodity is not actually removed shall be construed and regarded as removed. The Legislature is quite competent to enact a deeming provision fro the purpose of assuming the existence of a fact which does not really exist."

16. Recently in the case of M. Venugopal v. The Divisional Manager Life Insurance Corporation of India, Machilipainam, Andhra Pradesh and another, JT 1994 (1) SC 281 : 1994 (2) SCC 323, after referring to the case of East End Dwelling Co. Ltd. v. Finsbury Borough Council (supra), it was said that when one is bidden to treat an imaginary state of affairs as real, he must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, must inevitably have flowed."

However, as held in ***Fateh Bahadur Srivastava Vs. IInd Additional District Judge, Saharanpur and another 1987 (1) ARC 424,*** where direction has been made that the Rent Control and Eviction officer is directed to make a formal allotment of the disputed accommodation in favour of the petitioner no. 2 within one month failing which the deeming clause as stated above shall be made applicable.

In view of the above, a writ of certiorari is issued quashing the orders dated 12.04.2002/15.04.2002 and 19.04.2002 passed by the respondents nos. 1, 2 and 3 respectively.

A writ of mandamus is issued directing the District Magistrate/Rent Control and Eviction Officer to pass formal allotment order in favour of the petitioner no. 2 within a period of one month failing which he shall be deemed to have been allotted in accordance with the provisions of Section 17(1) read

with Sub Rule (7) of rule 10 of the Rules framed under the U.P. Act No. 13 of 1972.

Writ petition is allowed. No orders as to costs.

(Rajesh Tandon, J.)

07.02.2006

Rathour